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IN THE

Supreme Court of the United States

October Term, 1962.

No. 380.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Petitioners,

v.

RUTLAND RAILWAY CORPORATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 380.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, an unincorporated association, individually and as representative of the locomotive engineers employed by plaintiff; and A. S. MCCARTHY, individually and as General Chairman of said organization; BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, an unincorporated association individually and as representative of the locomotive firemen and enginemen employed by plaintiff; and RICHARD DAVIES, individually and as General Chairman of said organization; BROTHERHOOD OF RAILROAD TRAINMEN, an unincorporated association, individually and as representative of the brakemen employed by the plaintiff; and F. J. ESPOSITO, individually and as General Chairman of said organization; ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, an unincorporated association, individually and as representative of the conductors employed by the plaintiff; E. K. STONE, General Chairman, and R. H. BROWN, individually and as Local Chairman of said organization,

Petitioners,

v.

RUTLAND RAILWAY CORPORATION,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Counterstatement of Questions Presented.

1. Should this Court entertain a petition for certiorari now, the Court of Appeals having directed the District Court to make further findings of fact (as to "whether the railroad made reasonable efforts to settle this dispute") which findings, if decided affirmatively, would require further hearings (as to the damages to be assessed) before it

can be determined whether any of the issues here present will survive for review at that time?

2. Did the courts below correctly conclude that, for venue purposes, those petitioners who are unincorporated associations resided within the judicial district of Vermont because they did business and carried on substantial activities within that judicial district?

3. Did the courts below correctly conclude that the present case arose out of the interpretation or application of existing collective bargaining agreements and, therefore presented a *minor* dispute as that term has been used in applying the Railway Labor Act?

4. Did the courts below correctly conclude that the notice which respondent had served November 2, 1959 under Section 6 of the Railway Labor Act seeking future changes in existing agreements bore no relation to the *minor* dispute of September, 1960 over the scope and application of the existing agreements which resulted in the strike on September 16, 1960?

5. Did the courts below correctly conclude that an injunction could properly issue to protect the jurisdiction of the National Railroad Adjustment Board under the Railway Labor Act to hear and determine such a *minor* dispute which had been submitted to and accepted by it and that such injunction accommodates the applicable provisions of the Norris-LaGuardia Act?

Counterstatement of the Case.

Respondent agrees with the recitals as to the opinions below and with the jurisdictional statement set forth at page 2 of the Petition. However, respondent believes that

petitioners' statement of the case is not wholly accurate.[1] For example, at page 6 of the Petition, it is stated that prior to the instant dispute management had recognized on many occasions its duty to negotiate on the establishment of new runs and changes in runs and that it had never changed a terminal without negotiations and agreement with the Brotherhoods. Quite to the contrary, the District Court found:

> "Since January 1, 1953, on the Ogdensburg subdivision, there have been thirty-two changes of train runs or schedules instituted by the plaintiff. With one or two exceptions, none of these changes were held up pending negotiations between plaintiff and defendants." (Vol. I p. 74-a and see Vol. I p. 84-a)

The Court of Appeals found:

> "The court below found that in general there had been no negotiation in the past between the Rutland and its employees over changes in train runs. This finding was not clearly erroneous. Across the nation there seems to be no uniform pattern in this matter; some railroads have more latitude to act unilaterally over changes of this sort than do others." (App. pp. 28-29)

Respondent's statement of the case follows:

Rutland Railway Corporation (hereinafter referred to as "Rutland") is a Vermont railroad corporation which

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[1] The appendix to the petitioners' brief in the court below has been designated as Volume I and contains pages 1a-85a. Respondent's appendix in the court below has been designated Volume II and contains pages 1a-95a. Added to Volume II as pages 96a-99a is the appendix to petitioner's reply brief in the court below. By the foregoing designations, the original pagination before the court below has been retained. The appendix to the petition for a writ of certiorari has been designated herein as the Appendix. These documents are hereinafter referred to as Vol. I, Vol. II and App., respectively.

was engaged in interstate commerce regulated by the Interstate Commerce Commission.

Petitioners, The Brotherhood of Locomotive Engineers *et al.*, are unincorporated associations and certain officials thereof whose duties, responsibilities and employment are in the State of Vermont. They set up and maintained grievance committees and other organizations among the employees of the Rutland in Vermont, organized a strike of railroad employees in Vermont and negotiated with the management of the Rutland in Vermont. Petitioners are hereinafter collectively referred to as the "Operating Brotherhoods".

The Rutland had, at all times material, collective bargaining agreements with each of the Operating Brotherhoods. They became effective at various times from March 18, 1949 to and including September 1, 1951 and were in effect at all times here in issue.

During 1959 the Rutland had been in financial difficulty. Its plight continued to worsen in 1960. During the first 8 months of 1960 it hauled 5,300 carloads of freight fewer than it hauled in the comparable period of 1959. At the same time, it suffered a decrease in railroad operating revenue of $264,000, compared with the same period in 1959. This downward trend became acute early in 1960 and the Rutland's Board of Directors met in the spring and summer of 1960 in order to devise methods for solving this problem. Management was directed to, and did, work out a program designed to provide substantially the same or improved service to shippers and consignees and, at the same time, reduce expenses by approximately $210,000 per year. This program, in essence, was one which resulted in re-arranged train schedules—eliminating certain overlapping freight train runs.

Prior to September of 1960, four train runs and two yard switchers were operated on the Ogdensburg Subdivision of the Rutland. The extreme limits of this Subdivision are Ogdensburg, New York, and Alburg, Vermont. Two trains had operated daily in opposite directions between Alburg and Norwood, New York, which are 95.7 miles apart. Two other trains operated out of Malone, New York, which is 36 miles east of Norwood, one going to Ogdensburg, New York, 60.8 miles, and returning each day, the other going to Alburg, Vermont, 59.7 miles and returning each day.

The proposed new train runs were, that in place of existing runs, there would be two new train runs, a daily local freight train each way between Alburg and Ogdensburg, 120.5 miles.[2] The net effect of this was a reduction in the number of crews by two involving only ten employees.

The Rutland, pursuant to the decision of its Board of Directors, posted bulletins on September 8, 1960, which "bulletined" the new train runs in compliance with existing agreements with the Operating Brotherhoods. (App. pp. 27-8) This permitted operating employees to bid on the jobs so to be made available on September 17, 1960.

On September 15, 1960, the Operating Brotherhoods sent a single telegram indicating to the Rutland that they would strike because "carrier cancelling 1957 and 1959 agreements by bulletins and changing home terminals and run through Vermont terminal for certain local freight crews." The Rutland replied by telegram, which stated in part as follows:

> " . . . Rutland Railway Corporation effective September 17, 1960 will arrange train assignments to

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[2] A map of the Rutland, which was before the Court of Appeals for the Second Circuit, is annexed hereto as an exhibit for the convenience of this Court.

> conform to the demands of traffic. The change is not and cannot be shown to have violated any rule or agreement as alleged. No agreement has been violated and the carrier is merely exercising its right to operate in an economical manner. Conferences on this issue have not been held on the property with the [Operating Brotherhoods] • • • " (Vol. I p. 72a-73a)

The Operating Brotherhoods struck on September 16, 1960.

On September 26, 1960, the Rutland filed a complaint in the United States District Court for the District of Vermont requesting that Court to enjoin the strike, to order the defendants to comply with the procedural requirements of the Railway Labor Act and to award damages.

On September 30, 1960, the Rutland submitted the dispute arising from the Operating Brotherhoods' claim that its action violated existing agreements with them to the National Railroad Adjustment Board. The Rutland's position was there stated as follows:

> "There are no restrictions under the existing agreements which prohibit carrier from establishing runs, abolishing runs, changing runs to operate out of different terminals to conform to the demands of traffic and operating in an economical manner when there is a falling off of business."

The Operating Brotherhoods have filed their answer with the National Railroad Adjustment Board, but no decision has yet been made. Accordingly, at all relevant times, the issue as to the Rutland's right to make the changes in train runs has been and still is before the National Railroad Adjustment Board which has exclusive jurisdiction to decide issues as to the meaning of the existing agreements between the parties under the Railway Labor Act.

On October 7, 1960 the Operating Brotherhoods moved, in the District Court, to dismiss the action on the ground of improper venue. This motion was denied on October 10, 1960, a decision which subsequently was unanimously affirmed by the court below. The Operating Brotherhoods then answered and filed a counterclaim seeking an injunction against the Rutland to prevent it from putting into effect its new train runs.

Hearings on the merits were held before the District Court at Windsor, Vermont, on the 19th and 20th days of October, 1960. At those hearings the testimony of 14 witnesses was heard and voluminous exhibits were presented to, analyzed by, and made a part of the record before the District Court. On October 26, 1960, the Court made its findings of fact and conclusions of law and entered its judgment order enjoining the strike.

In essence, the District Court found:

1. The Rutland had not previously negotiated changes in train runs with the Operating Brotherhoods.

2. All of the contentions of the Operating Brotherhoods turned upon the interpretation and application of the relevant provisions of the existing collective bargaining agreements.

3. Nothing in any of the agreements between the Rutland and the Operating Brotherhoods restricted the Rutland in any way as to the number of trains it must run nor were there any limitations in them which would prevent the Rutland from adding or abolishing train runs.

4. The District Court held, therefore, that the dispute was a *minor* dispute.

5. The Section 6 notices, hereinafter discussed, bore no relation to the actual controversy here involved.

The District Court granted the injunction against the Operating Brotherhoods stating that hearings on damages would be held at a later date. The Operating Brotherhoods' counterclaim was denied. (Vol. I, pp. 69a-78a, 83a-84a) Subsequently, on November 18, 1960, at the request of the Operating Brotherhoods, the District Court amended certain of its findings. The changes did not materially affect the original findings. (Compare Vol. I pp. 69a-77a with pp. 83a-84a)

The Operating Brotherhoods then appealed to the United States Court of Appeals for the Second Circuit.

As stated above, the court below unanimously upheld the decision of the District Court as to venue. A majority held that the dispute in issue was a *minor* dispute. It also found that, if the Rutland had made good faith efforts to confer with the Operating Brotherhoods about the dispute, then the District Court had properly found that the injunction against the strike should issue. The court below stated that the District Court had made no finding with respect to such efforts and, therefore, it reversed and remanded this action for further proceedings not inconsistent with its opinion.

If the District Court should find that the Rutland acted in good faith then it would have to hold a further hearing as to the damages suffered by it as a result of the strike by the Operating Brotherhoods.

The majority recognized the facts found by the District Court, holding, in effect, that the dispute at issue involved the right of the Rutland to change freight train runs under the existing agreements with the Operating Brotherhoods. The majority noted as well that certain Section 6 notices served by the Rutland on the Operating Brotherhoods, which are hereinafter described, and in which the Rutland proposed certain changes in the existing agreements with the Operating Brotherhoods, were restricted by their own

terms to proposals to change procedures for establishing new runs "... which the carrier does not now have the right to establish without agreement with its employees, ..." Finally, the majority observed that the Rutland's unilateral right under the existing agreements to change train runs was not affected by the Section 6 notices which, again, by their own terms, provide that, "all agreements * * * which conflict with the above shall be eliminated, except that existing rules and practices considered by the carrier to be more favorable are preserved."

Justice Marshall, after agreeing with the majority's treatment of the venue problem and with the fact that a labor dispute was involved in this case, dissented on the ground that the Rutland had voluntarily terminated so much of its existing collective bargaining agreements as might cover its right to establish the new train runs. In other words, he found that by serving the Section 6 notices referred to on the Operating Brotherhoods, the Rutland had terminated all provisions of existing collective bargaining agreements upon which the Rutland based its right to make the changes in train runs which are at issue here. He reached this conclusion in spite of the fact that under the provisions of the Railway Labor Act no carrier has power to change such agreements except by following the procedures thereof, which were only put in motion by the Section 6 notices, and the fact that no revised agreement has yet resulted therefrom. Based upon his conclusion that such agreements had been terminated, Justice Marshall held that the resulting dispute could no longer be *minor* because it could no longer involve the interpretation of existing agreements. He concluded that the dispute was a major dispute.

To understand the relationship between the dispute as to the Rutland's existing agreements which precipitated the strike and the dispute arising out of the Section 6

notices, one must determine, as have the courts below, whether or not the Rutland's then existing collective bargaining agreements contained any restriction on the Rutland's right to maintain or change the number of trains which it must run, the terminals thereof or the number of employees it must utilize in connection therewith. The District Court found as a fact that no such restrictions existed and the court below held that the existing collective bargaining agreements, reasonably interpreted, recognized implicitly a right in the railroad unilaterally to make the changes which it bulletined on September 8, 1960.

The Section 6 notices which had been sent on November 2, 1959 did not in any way change this situation. By their terms, the Section 6 notices[3] specified that they only

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[3] The relevant part of the text of the notices given by the Rutland to each of the Operating Brotherhoods was identical and read as follows:

"We hereby give notice, under our existing agreements and pursuant to the provisions of the Railway Labor Act, that effective January 1, 1960, we propose to revise and supplement such agreement or agreements in accordance with the proposal set forth in 'Attachment A' appended hereto.

ATTACHMENT A

* * * * *

"ROAD TRAIN AND ENGINE SERVICE ASSIGNMENTS.

"A. Except as hereinafter provided, eliminate all agreements, rules, regulations, interpretations, and practices, however established, applicable to any class or grade of road train or engine service employees, which

"(i) prohibit or impose restrictions on the right of the carrier to establish, move, consolidate or abolish crew terminals, or merge or consolidate seniority districts,

"(ii) prohibit or impose restrictions on the establishment or operation of interdivisional, inter-seniority district, intradivisional or intraseniority district runs,

"(iii) prohibit or provide penalties for running crews through established crew terminals, or

"(iv) provide for automatic release of crews upon arrival at terminals or end of run, or when off of assigned territory.

"B. Establish a rule to provide that

"1. The carrier shall have the right to establish, move, consolidate and abolish crew terminals, to merge and consolidate

applied to those situations where "the carrier does not now have the right to establish [changes in train runs] without agreement with its employees * * *". Their applicability was further restricted as shown in Section B-3 thereof which provided:

> "All agreements, rules, regulations, interpretations and practices, however established, which conflict with the above shall be eliminated, *except that existing rules and practices considered by the carrier to be more favorable are preserved.*" Emphasis Supplied. f.n. 3, *supra.*

The majority opinion of the court below recognized the significance of the distinct and separate procedures utilized under the Railway Labor Act to handle major and *minor* disputes.

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seniority districts, and to establish interdivisional, interseniority district, intradivisional and intraseniority district runs in assigned and unassigned service with the right to operate any such run, whether assigned or unassigned (including extra service), on either a one way or turnaround (including short turnaround) basis and through established crew terminals. * * *

"2. No rule, regulation, interpretation or practice, however established shall be construed to in any way prohibit, restrict or limit the provisions of paragraph 1 of this rule except as provided in sub-paragraphs (a) and (b) of this paragraph 2.

* * * * * *

"(b) *Before a run is established under the provisions of this rule which the carrier does not now have the right to establish without agreement with its employees* and which involves both the establishment of a new home terminal for the class of service involved and operation through an established crew terminal or terminals for such class of service, the carrier shall give notice to the general chairman * * *

"3. *All agreements, rules, regulations, interpretations and practices, however established, which conflict with the above shall be eliminated, except that existing rules and practices considered by the carrier to be more favorable are preserved.*" Emphasis Supplied. (App. pp. 6-7)

Major disputes involve *future* changes in *existing* agreements. They involve the *creation* of new contractual rights and are settled by non-compulsory procedures. First they are submitted to mediation, 45 U. S. C. §155 First; if that fails, to acceptance or rejection of arbitration, 45 U. S. C. §155 First; and, finally, to possible presidential intervention, 45 U. S. C. §160. Not until these procedures fail, can the parties resort to self-help (App. pp. 20-1).

Minor disputes involve the meaning and application of *existing* rights under *existing* agreements. As such, the Railway Labor Act provides for *compulsory arbitration* by the National Railroad Adjustment Board whose awards are final and binding, 45 U. S. C. §153, First (i), (m) and (p).

In summary, the Rutland, complying with its existing agreements with the Operating Brotherhoods, on September 8, 1960 posted bulletins announcing the new train runs. This was necessary because of the severe freight and income loss suffered by it in 1960. The Rutland had the unilateral right to make these changes. The strike arose solely as a result of the proposed new train runs. The Section 6 notices had no bearing on this. All of the contentions of the Operating Brotherhoods turn on the interpretations and application of the relevant provisions of existing collective bargaining agreements. This is a *minor* dispute under the Railway Labor Act. The existence of the Section 6 notices, having for their purpose *future* changes in *existing* agreements, did not, of themselves, change the *existing* agreements. Nor did they have any bearing upon the *minor* labor dispute which subsequently arose under those agreements. They did not preclude the submission of the *minor* dispute to the Adjustment Board or deprive that Board of its jurisdiction under the Railway Labor Act.

Summary of Argument.

Under Rule 19 of this Court, the question here presented is whether this Court in its sound discretion should grant the petition for a writ of certiorari and whether there exists in this case the "special and important reasons" which might lead this Court so to do. The Petition asserts incorrectly that a conflict exists with a decision of another Court of Appeals with regard to the venue of an unincorporated association. It is also asserted that the court below has decided an important question affecting labor relations in the railroad industry in a manner in conflict with appropriate decisions of this Court.

Respondent submits that the decisions by the courts below were correct under settled Federal law not only on the issue of venue but also as to those issues raised under the Railway Labor Act and the Norris-LaGuardia Act as those acts have been construed by prior decisions of this Court which offer clear and sufficient guidance for the decision reached below. There is no necessity for further consideration of the decision below by this Court.

Respondent further submits that to grant a petition for certiorari at this stage in the incomplete proceedings pending before the District Court could only lead to a multiplicity of appeals, confusion and delay in a final resolution of all of the issues here present after all findings of fact required to be made have been completed. Only then can it be determined whether or not any issues survive which might require resolution by this or any other court.

Argument.

I.

The petition for a writ of certiorari is premature and could result in a multiplicity of appeals, confusion and delay in the final resolution of the issues here present.

The decision below requires the District Court for the District of Vermont to hold hearings "to determine whether the railroad made reasonable efforts to settle this dispute in conference." This issue has not yet been tried.

If it is answered negatively, the Rutland will seek an appeal from such result.

Should the hearing result in a finding that the Rutland had made reasonable efforts to settle this dispute in conference, it must be assumed that the Operating Brotherhoods would either attempt to appeal that decision at that time or the District Court, in accordance with its decision below, would then be required to and would hold a further hearing "* * * on the issue of damages for this illegal strike * * *."

Only at the conclusion of this second hearing, on the assumption that the Rutland meets its burden at the first hearing, will all issues which have been presented to the courts below be resolved.

It is clear, therefore, that this petition for certiorari is premature. If granted, at least one and possibly two issues still remain open and subject to later determination by the District Court.

Any delay in the final determination as to the Rutland's reasonable efforts to settle this dispute in conference may result in prejudice to the Rutland because the subject of

the hearing will be events which occurred during 1960. Already two years have elapsed.

For all of these reasons, this is clearly not a proper time for review by this Court of the decision below. One and possibly two issues are outstanding and subject to further proceedings in the District Court. Logic and the orderly administration of justice require that no appeal be entertained until all issues here present have been finally disposed of by the District Court.

II.

The unanimous decision of the court below that an unincorporated association is subject to suit within the judicial district wherein it does business and carries on substantial activities within the venue statute, 28 U. S. C. §1391, was not in conflict with the decision of another court of appeals and represents the correct and proper interpretation of that statute.

The only Court of Appeals case cited by petitioners as evidencing a conflict with the decision of the court below on the venue question is *Brotherhood of Locomotive Firemen* v. *Graham*, 175 F. 2d 802 (D. C. Cir. 1948), reversed on other grounds, 338 U. S. 232 (1949).

The *Graham* case did not involve the venue statute in issue here. The briefs on appeal were written in terms of a different venue statute and that Court limited its holding to that statute. No actual conflict exists "on the same matter" [Rule 19(b) of the Rules of this Court] between the decision of the Court of Appeals in the *Graham* case and the decision below.

The *Graham* case did involve a consideration of the then existing venue statute as applied to unincorporated associations. 28 U. S. C. §112 (1947) provided that:

> ". . . no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."

This venue statute was replaced, effective September 1, 1948. It became 28 U. S. C. §1391. In contrasting §112 and §1391(b) it should be noted, in passing, that, first, the old statute, which spoke in terms of a single defendant, was amended to include plural defendants. Second, the word "inhabitant" was deleted and the word "reside" was added together with the phrase "except as otherwise provided by law."

The applicable provisions of §112's replacement, §1391, which apply here read as follows:

> "§1391. Venue generally.
>
> . . .
>
> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.
>
> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Although the provisions of §112 relied upon by the Court in the *Graham* case, *supra*, were substantially similar to §1391(b), that Court made it quite clear that, although it discussed Section 1391(b) it did not rely upon it. The Court stated at p. 804 note 2:

> ". . . [S]ince the decision of the trial court in the instant case was rendered and the briefs on appeal written in terms of the venue provision as

> phrased in Section 112, we refer in this opinion to that phrasing rather than to the phrasing of Section 1391(b)."

The Court in the *Graham* case heard argument on April 13, 1948. The new venue statute did not become effective until September 1, 1948. The decision of that Court of Appeals was not rendered until October 26, 1948. A detailed reading of its decision shows that the Court never considered Section 1391(c). This fact was commented upon subsequently in *Portsmouth Baseball Corporation* v. *Frick*, 132 F. Supp. 922 (S. D. N. Y. 1955), at p. 926:

> ". . . The Court of Appeals simply shut its eyes to subdivision (c) of Section 1391. . . . I cannot believe that the statement represents the court's mature and considered appraisal of the new legislation. It must have been the result of inadvertence. The purpose and effect of the new legislation [§1391] was to remove the existing limitation . . .".

Section 1391(c) is the key section for the purpose of determining whether a conflict exists. It is the section which prompted the court below to extend the concept of venue accorded corporations to that accorded unincorporated associations.

The court below, in applying the revised venue statute, 28 U. S. C., §1391, and especially subsection (c), properly followed the reasoning of Judge Learned Hand in *Sperry Products* v. *Association of American R. R.*, 132 F. 2d 408 (2d Cir. 1942), cert. denied, 319 U. S. 744 (1943), which involved the interpretation of the venue provision for patent infringement actions. This provision, 28 U. S. C., §109 (1940) stated that a suit for patent infringement might be brought "in the district of which the defendant is an inhabitant, or in any district in which the defendant . . .

shall have committed acts of infringement and have a regular and established place of business."

The court below followed Judge Hand's reasoning as to the only practical approach to the procedural problems involving unincorporated associations. It also relied upon the liberalization created by subsection (c), which specifies that a corporation could be sued wherever it was doing business. The court below assimilated the "residence" of unincorporated associations under 28 U. S. C., Section 1391(b) to that of corporations, 28 U. S. C., Section 1391(c). It held, therefore, that the "residence" of an unincorporated association for venue purposes under §1391(b) should be interpreted to include the judicial districts in which such an unincorporated jural entity was doing business.

For these reasons, if for no other, no true conflict exists between the decision in the *Graham* case and the decision of the court below.

The decision below was proper. See, for example, the rationale of the District Courts in *Portsmouth Baseball Corporation* v. *Frick, supra* and *American Airlines, Inc.* v. *Air Line Pilots Ass'n Inter.*, 169 F. Supp. 777 (S. D. N. Y. 1958), which represents the realistic, practical and enlightened point of view. These cases rely upon the reasoning of Judge Learned Hand in *Sperry Products, supra.* He stated, at p. 411:

> "It is not altogether clear a priori how to attribute location to a collective venture even after one has called it a jural person. In the case of a corporation, courts for long evaded the difficulty by saying that it was located in the state of its incorporation within whose borders it was confined. Bank of Augusta *v.* Earl, 13 Pet. 519, 10 L. Ed. 274. It finally became evident, however, that this resulted in too much injustice to be tolerable, and eventually there was evolved the concept that a corporation

> could be 'present' outside its state, that fact being determined by the extent of its local activities . . . . Obviously the same situation arises whenever we are to determine the location of an unincorporated association . . . As to such an association the test must always be what it is for a corporation outside the state of its incorporation. Indeed it is troublesome to see in what other way one can attribute location to such an association at all. It does not violate common understanding to think of a common venture or enterprise as having spatial position wherever any part of those activities take place by which it is realized. That is a practicable test and it is really the only practicable test. . . . There remains, so far as we can see, only what we have suggested; and we hold that the defendant Association was present wherever any substantial part of its activities were continuously carried on. Among those places was the Southern District of New York."

Judge Frank, concurring, stated at p. 412:

> ". . . I think we should, therefore, hold that the Association here is an inhabitant of, and can be sued in, the Southern District of New York, if that is *one* of its principal places of doing business."

The reasoning in the *Sperry* case appears to have been a most important factor in giving rise to the liberalized venue amendments of 1948 which were incorporated in 28 U. S. C. §1391. They were clearly designed to liberalize the restrictive venue requirements of the old statute relied on in the *Graham* case.

Contrary to the point of view stated in the Petition at p. 12, a basis exists for determining the intention of Congress with respect to liberalizing venue requirements relating to suits against labor organizations arising under

Federal law from at least 1947 on. In *American Airlines, Inc., supra*, this was shown at p. 782:

> "The soundness of the rule of the Portsmouth case, at least in so far as it applies to labor organizations, is indicated by Section 301 of the Labor Management Relations Act of 1947, enacted prior to Section 1391, which liberalized jurisdiction and venue requirements in suits against them. 29 U. S. C. A. §185."
>
> "Section 301 provides:
>
> "(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members."
>
> "It may well be that Section 301 applies to labor organizations generally in suits arising out of federal law. This is indicated by the limited application of subdivisions (a) and (b) of Section 301 as contrasted with the apparently unlimited application of subdivision (c). Nor is this view at all inconsistent with the legislative history of this section.
>
> "But quite apart from this, Section 301 showed the mood of Congress with respect to suits against labor organizations arising under federal law at the time when Section 1391 was passed. * * *"

The decision below clearly represents the practical solution of a difficult problem. There is no necessity for this Court to comment thereon. It cannot be denied that the Operating Brotherhoods maintain grievance committees and other organizations among the employees of

the Rutland in Vermont, organized a strike of Rutland employees there and took other steps against the Rutland within the State of Vermont. If three of the four Operating Brotherhoods maintain a principal place of business in Cleveland, Ohio, and the fourth maintains a principal place of business in Cedar Rapids, Iowa, where should venue lie when all of the acts giving rise to the cause of action took place within the State of Vermont?[14]

In summary, no actual conflict exists between the decision in the *Graham* case and that of the court below. There is, therefore, no reason why this Court should consider the venue question in this case.

III.

This was a minor dispute as that term is used in the application of the Railway Labor Act.

This Court in *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711 (1945), at pp. 723 to 724, set forth the distinction between major and *minor* disputes under the Railway Labor Act. The distinction there drawn, between those disputes which involve an attempt to acquire rights for the future by changing the terms of existing agreements (major disputes) and those disputes which involve the assertion of rights claimed to have accrued in the past (minor disputes), has been subsequently recognized and applied on numerous occasions by this Court and by lower courts as well-settled law.

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[14] At the trial, all 14 witnesses were residents of Vermont, northern New York and New Jersey. 4 of 5 individual defendants were residents of Vermont. The fifth was a New York resident. Even if it is assumed, *arguendo*, that petitioners' view is correct, this action would be subject to transfer to Vermont under 28 U. S. C. §1404(a).

This Court has recognized disputes arising under existing agreements as minor disputes in *Brotherhood of Railroad Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30 (1957), and in *Brotherhood of Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U. S. 528 (1960), rehearing denied, 364 U. S. 854.

Numerous lower courts have applied the principles of the *Elgin* case. *Baltimore & Ohio R. Co.* v. *United Railroad Wkrs.*, 271 F. 2d 87 (2d Cir. 1959), reversed and remanded on other grounds, 364 U. S. 278 (1960); *Norfolk & P. B. L. R. Co.* v. *Brotherhood of Rail. Train.*, 248 F. 2d 34 (4th Cir. 1957), cert. denied, 355 U. S. 914 (1958); *In re Hudson & Manhattan Railroad Company*, 172 F. Supp. 329 (S. D. N. Y. 1959), affirmed, 267 F. 2d 941 (2d Cir. 1959), cert. denied, 363 U. S. 843 (1960); *Louisville & Nashville Railroad Company* v. *Brown*, 252 F. 2d 149 (5th Cir. 1958), cert. denied, 356 U. S. 949 (1958).

Petitioners contend, Petition pp. 19-22, that the decision of the court below is in conflict with *Order of Railroad Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U. S. 330 (1960). They rely on the statement that the dispute there at issue was major because it "relat[ed] to a major change, affecting jobs, in an existing collective bargaining agreement" at page 341. Both this language cited by petitioners, and an earlier statement by that court, indicate that the *Railroad Telegraphers* case, unlike this case, was a situation where the dispute arose over the attempt by one of the parties to *change* the terms of an existing agreement—which change clearly creates a major dispute: The court stated in *Railroad Telegraphers, supra*, at page 336:

> "'Plainly the controversy here relates to an effort on the part of the union to change the 'terms' of an existing collective bargaining agreement.'"

Furthermore, as noted by the court below, if the *Railroad Telegraphers* court were adding the ingredient of the magnitude of the effect on working conditions as a condition relevant to whether a dispute was major or *minor, here only ten jobs were eliminated.* In *Railroad Telegraphers* an estimated several hundred jobs would have been eliminated. (See p. 343) See also *Brotherhood of Locomotive Engineers* v. *M.-K.-T. R. Co., supra,* decided after *Railroad Telegraphers* where this Court decided that a dispute affecting the jobs of five way-freight crews was a *minor* dispute on facts substantially similar to those presented to the court below.

When the Rutland "bulletined" its proposed train runs on September 8, 1960, it did so under the terms and conditions of its existing collective bargaining agreements with the Operating Brotherhoods. The finding by the District Court below that there had been no negotiations in the past between the Rutland and its employees over changes in train runs was not clearly erroneous. Further, across the nation, contrary to petitioners' assertion, at page 13 of their Petition, there is no national or uniform pattern as to whether management has the *unilateral* right to change train runs. Some railroads have more latitude to act unilaterally over changes in train runs than others.[5] Also, the Court below recognized that the finding by the trial judge that the existing agreements involved here, reasonably interpreted, implicitly recognized a right in the Rutland to make the changes which it had bulletined on September 8, 1960 was a proper finding consistent with existing law (App. pp. 29-31).

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[5] Presidential Railroad Commission Report (Feb. 28, 1962) at p. 295.

There can be no doubt that the decision by the courts below that the present dispute constituted a *minor* dispute was in accordance with settled Federal law enunciated in harmony with decisions of this Court and as applied in numerous decisions of other lower courts.

IV.

The dispute created by Respondent's Section 6 notices of November 2, 1959 has no relation to this case.

Inherent in the arguments made in the Petition herein, and especially at pages 12 through 27, is petitioners' assumption that the dispute involved here (as to the meaning of existing agreements which resulted in the September, 1960 strike) is the same dispute over the issues raised by the notices served on the Operating Brotherhoods under Section 6 of the Railway Labor Act. The Section 6 notices initiated procedures under the Act looking to *future* revision of *existing* agreements. These procedures as of this date have not been exhausted. This assumption and the arguments made therefrom are incorrect. The District Court found:

> "5. The facts that the carrier gave a Section 6 notice to its operating Brotherhoods on November 2, 1959, regarding a proposed new agreement to confirm its alleged unilateral authority under the existing agreements to abolish, establish, and move crew terminals, and that conferences on this proposed new agreement had not been terminated on September 8, 1960, *do not extinguish the underlying minor dispute or preclude submission of it to the Adjustment Board.* See *In the matter of Hudson & Manhattan Railroad Company*, 172 F. Supp. 329

> (S. D. N. Y. 1959), aff'd sub. nom. *Stichman* v. *General Grievance Committee of the Brotherhood of Railroad Trainmen*, 267 F. 2d 941 (2d Cir. 1959), cert. denied, 361 U. S. 928 (1960). *Nor should these facts be deemed to stay the underlying minor dispute until major dispute procedures are exhausted.*" Emphasis Supplied. (Vol. I, p. 76a).

The majority opinion of the Circuit Court below stated:

> ". . . the court below found that the railroad in making the September 1960 changes was not acting pursuant to the earlier [Section 6] notices. We cannot say that the district court was in error in so finding." (App., p. 26).

Petitioners' constant reference to the Section 6 notices, which admittedly created a major dispute under Section 6 of the Act, is designed to create the impression that the obligations of Section 6 were somehow transferred to the *minor* dispute which arose a year later out of a completely different situation. Nowhere do petitioners set out the full text of the applicable portions of the Section 6 notices which were served in 1959 and, which by their own terms, establish without more that the notices served by the Rutland had no relationship to the instant dispute. The full text of the notices served has been set forth *supra*, at p. 10, fn. 3.

The court below correctly analyzed the distinctions existing between this proceeding and *Butte Anaconda & P. Ry. Co.* v. *Brotherhood of L. F. & E.*, 268 F. 2d 54 (9th Cir. 1959), cert. denied, 361 U. S. 864 (1959) (App., pp. 26 and 27). There the carrier issued Section 6 notices in which it first proposed to allocate certain loading formerly done by yard crews to main line crews. No agreement as to this was reached. A second proposal to

reduce the size of yard crews was made and was also unacceptable. The carrier then announced that its shipper would do its own loading. The shipper owned all of the stock of the railroad. It was there held that the major dispute commenced by the carrier's Section 6 notices continued, for the action taken by the shipper should be imputed to its wholly-owned subsidiary, the railroad.

Here, however, as was properly found by the courts below, the Section 6 dispute was not related to this dispute at all (Vol. I, p. 76a; App. p. 26). There was no past practice in existence between the Rutland and the Operating Brotherhoods which would limit the Rutland's right to make the changes encompassed in its notices of September 8, 1960. In addition, and even more important, as was found by the courts below, there were no restrictions in the collective bargaining agreements between the Rutland and the Operating Brotherhoods which would limit the Rutland's unilateral right to make the changes which it had bulletined on September 8, 1960. The District Court so found, p. 7, *supra;* Vol. I, p. 74a. This finding was affirmed by the court below (App., pp. 29-30).

The Section 6 proceeding involved negotiations looking only to *future* changes in existing agreements. It did not, and could not, involve a dispute as to the meaning and application of provisions of existing agreements. It has no application, therefore, to the *minor* dispute underlying the strike here in issue. See *Hilbert* v. *Pennsylvania Railroad Company*, 290 F. 2d 881 (7th Cir. 1961), cert. denied, 368 U. S. 900 (1961), where that Court so held in an almost identical situation involving the same Section 6 notices here in issue. Clearly the management of the Rutland had the unilateral right to make the changes in train runs bulletined on September 8, 1960 without negotiating with the Operating Brotherhoods.

These findings by the District Court, affirmed by the Court below, are not in conflict with any of the provisions

of the Railway Labor Act. They are in in accord with those decisions which have interpreted its meaning as applied to the facts of the instant case.

V.

The court below correctly concluded that an injunction should issue to protect the jurisdiction of the National Railroad Adjustment Board, under the Railway Labor Act, to hear and determine a *minor* dispute which had been submitted to and accepted by it. Such an injunction accommodates the applicable provisions of the Norris-LaGuardia Act and conforms with prior decisions of this and other Courts.

The purposes and requirements of the Railway Labor Act and their subsequent interpretation by this and other court establishes the propriety of the decision of the court below.

The purposes of the Railway Labor Act, 45 U. S. C. §151 *et seq.* as set forth in §151a includes:

> "* * * (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; * * * (4) To provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) To provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

In *Elgin, J. & E. R. Co.* v. *Burley, supra,* this Court first considered the legislative history and the logical rationale behind the different treatments accorded disputes under the Railway Labor Act arising out of §151a(4)—major disputes and §151a(5)—*minor* disputes.

Contrary to the position taken in the Petition at page 14, the *Elgin* case and cases following have served to clarify and fulfill the purposes of the Railway Labor Act.

Major disputes involve *future* changes in *existing* agreements. They involve the *creation* of new contractual rights and are settled by non-complusory procedures. First they are submitted to mediation, 45 U. S. C. §155 First; if that fails, to acceptance or rejection of arbitration, 45 U. S. C. §155 First; and, finally, to possible presidential intervention, 45 U. S. C. §160. Not until these procedures fail, can the parties resort to self-help (App. pp. 20-1).

Minor disputes involve the meaning and application of *existing* rights under *existing* agreements. As such, the Railway Labor Act provides for *compulsory arbitration* by the National Railroad Adjustment Board whose awards are final and binding, 45 U. S. C. §153, First (i), (m) and (p).

Analysis of *Brotherhood of Railroad Trainmen* v. *Chicago River & I. R. Co., supra,* supports and reaffirms this conclusion. There this Court utilized its own prior and proper interpretation of the Railway Labor Act to determine whether an anti-strike injunction did properly issue to protect the exclusive jurisdiction of the National Railroad Adjustment Board over a *minor* dispute. The historically significant question resolved by this Court was whether or not such an injunction violated the provisions of the Norris-LaGuardia Act (29 U. S. C. §101 *et seq.*).

In *Chicago River, supra,* this Court finally established that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. It held at page 40:

> "• • • the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that

statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable."

On other occasions this Court, prior to *Chicago River*, had utilized injunctive relief to protect the statutory procedures of the Railway Labor Act: *Virginian Ry. v. Federation*, 300 U. S. 515 (1937); *Brotherhood of Railroad Trainmen v. Howard*, 343 U. S. 768 (1952).

Since *Chicago River*, this Court and others have consistently followed that decision when, as here, the facts warranted it.[6] See for example *Brotherhood of Locomotive Engineers v. M.-K.-T. R. Co., supra; Hilbert v. Pennsylvania Railroad Company, supra.* Contrary to the Petition at page 22, in *Sinclair Refining Co. v. Atkinson*, 370 U. S. 195 (1962) this Court at pp. 210-212 reaffirmed its earlier *Chicago River* decision and its application to Railway Labor Act situations such as this one.

An injunction is properly issued to enforce compliance with the requirements of the Railway Labor Act that a *minor* dispute is to be heard and determined by the National Railroad Adjustment Board only. No conflict with the Norris-LaGuardia Act exists. This result reached by the court below does not conflict with *Chicago River*, or other decisions of this Court.

In summary, the factual situation presented by this case cannot be applied generally in the railroad industry. There is no national pattern as to whether or not a carrier's management under its existing agreements has the unilateral right to make changes in operations of the type in issue here. Contrary to the dissenting opinion in the court below, the dispute as to future terms and conditions of employment to be incorporated in new agreements which was created by

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[6] The facts found by the District Court in this case are discussed herein at page 7.

the Section 6 notices has no relation whatsoever to the *minor* dispute which resulted in the illegal strike of September 16, 1960. There had been no negotiations in the past nor were there any restrictions in existing collective-bargaining agreements which limited management's unilateral right to make the changes in issue here. The Court below correctly concluded that venue was proper and an injunction could issue under the circumstances here present. These and all holdings of the court below were correct under settled Federal law. They were in harmony with the terms of the Railway Labor Act and the Norris-LaGuardia Act and the decisions of this Court which have construed them.

In any event, the petition is premature. At least one if not two hearings are required before a final determination of all issues can be made.

Conclusion.

For the foregoing reasons, respondent respectfully submits that this case is not a proper one for review by certiorari in this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CHARLES D PEET,
HARRY F. MARTIN, JR.,
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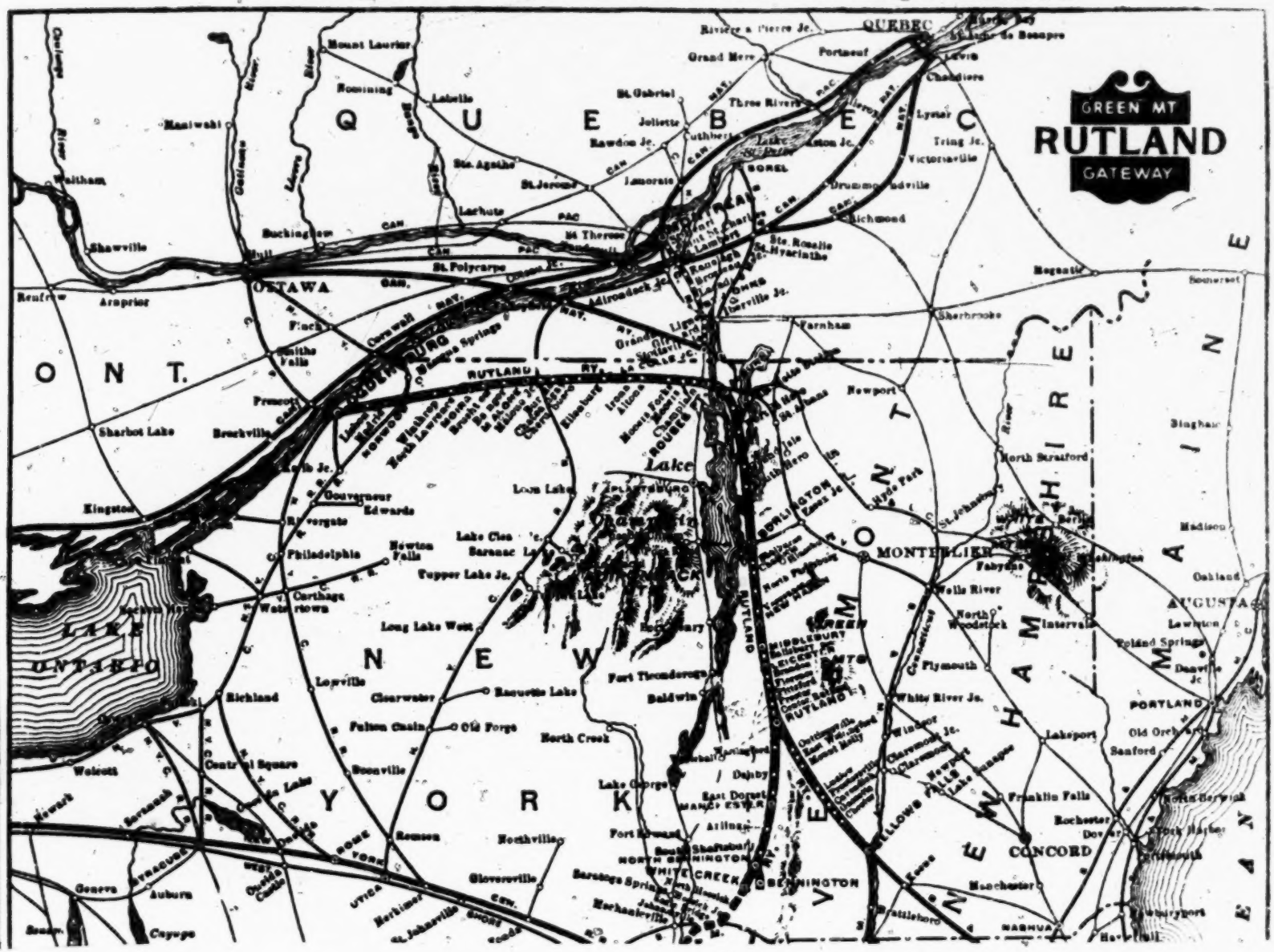
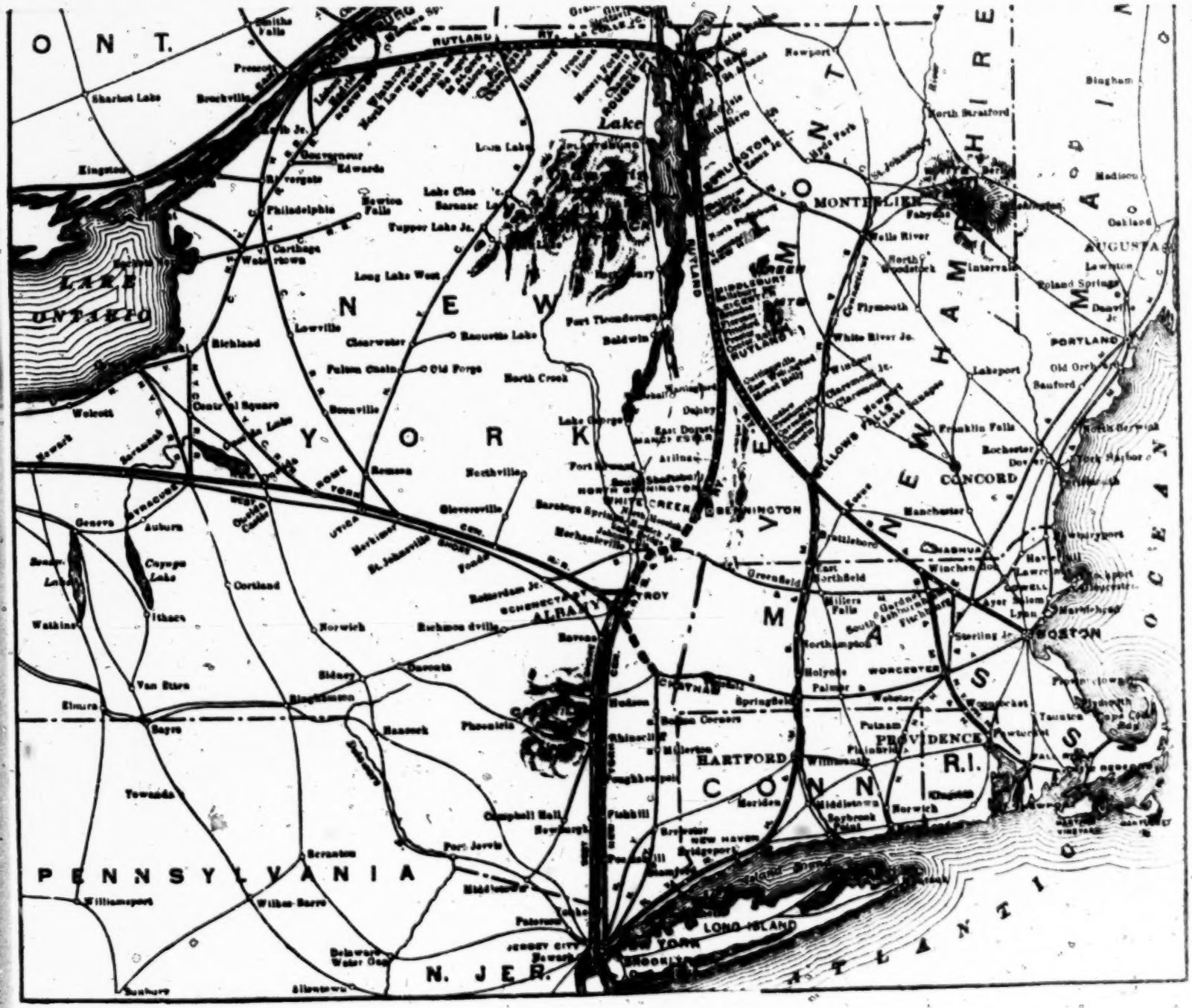
October 4, 1962.

"GREEN MOUNTAIN—LAKE CHAMPLAIN ROUTE"

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